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In the Supreme Court
of the United States

OCTOBER TERM, 1969
CASE NO. 245

CAROL DERRINGTON,

Petitioner,

v.

CITY OF PORTLAND,

Respondent.

RESPONDENT'S BRIEF CONTENDING THIS CASE IS MOOT

MARIAN C. RUSHING
RICHARD A. BRAMAN
306 City Hall
Portland, Oregon 97204
Counsel for Respondent

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-69

SUBJECT INDEX

	Page
Question Presented	1
Respondent's Statement of the Case	1
Argument	2
Appendix A — Judgment Order in the Circuit Court of the State of Oregon for Multnomah County dated July 3, 1969	7

TABLE OF AUTHORITIES

CASES

Carafas v. *LaVallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968)	5
Ginsberg v. *New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968)	5
Jacobs v. *New York*, 388 U.S. 431, 87 S. Ct. 2098, 18 L. Ed. 2d 1294 (1967)	5
Liner v. *Jafco*, 375 U.S. 301, 84 S. Ct. 391, 11 L. Ed. 2d 347 (1964)	3
New Orleans v. *Vinci*, 96 So. 110, 28 A.L.R. 1382 (La. 1922)	3
Portland v. *Erickson*, 39 Or. 1, 62 P. 753 (1900)	3
St. Pierre v. *United States*, 319 U.S. 41, 63 S. Ct. 910, 87 L. Ed. 1199 (1943)	4
Sibron v. *New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968)	5
Street v. *New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969)	6
Tannenbaum v. *New York*, 388 U.S. 439, 87 S. Ct. 2107, 18 L. Ed. 2d 1300 (1967)	5
Travis v. *United States*, 364 U.S. 631, 81 S. Ct. 358, 5 L. Ed. 2d 340 (1961)	5

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QUESTION PRESENTED

Should a writ of certiorari be granted to review a state supreme court opinion upholding the constitutionality of a city ordinance where, subsequent to that opinion, the petitioner was acquitted of the charge of violating the city ordinance?

RESPONDENT'S STATEMENT OF THE CASE

The petitioner herein was arrested for violating Section 16-917 of the Portland Police Code (Pt. 4).

After her conviction in the Municipal Court of Portland, she appealed to the Circuit Court of the State of Oregon for Multnomah County. The circuit court sustained her demurrer to the complaint against her on the ground that Section 16-917 was unconstitutional (Pt. Appendix B). The City of Portland appealed the order to the Oregon Supreme Court, which reversed the order and remanded the case, with instructions to overrule the demurrer (Pt. Appendix C).

After a petition for rehearing was denied by the Oregon Supreme Court, the petitioner filed the petition herein for a writ of certiorari (Pt. 1). Meanwhile, the main case was remanded to the circuit court, where the petitioner was tried by jury and found not guilty of the charge against her. A copy of the Judgment Order (Appendix A hereto) was sent by counsel for respondent to the Office of the Clerk, Supreme Court of the United States, with the suggestion that petitioner's acquittal rendered the petition for a writ of certiorari moot. The Clerk of the Court replied that counsel for the petitioner did not agree on the issue of mootness, and suggested the submission of this brief.

ARGUMENT

The petition for a writ of certiorari herein involves a collateral issue of whether the ordinance, which petitioner was charged of violating, is constitutional. In the main case, a jury found the petitioner herein not guilty of the charge against her. Respondent here-

in cannot appeal from that verdict. *Portland* v. *Erickson*, 39 Or. 1, 10, 62 P. 753, 755 (1900). The judgment of acquittal therefore terminates the main case and, respondent contends, renders the collateral issue moot.

The existence of a case or controversy is a constitutional prerequisite to invoking the jurisdiction of the U. S. Supreme Court. As stated in *Liner* v. *Jafco*, 375 U.S. 301, 306, 84 S. Ct. 391, 394, 11 L. Ed. 2d 347, 351, n. 3 (1964):

> "Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy. * * *"

A case involving the same issue and substantially similar facts as herein is reported in *New Orleans* v. *Vinci*, 96 So. 110, 28 A.L.R. 1382 (La. 1922). In that case the defendant, convicted of a city ordinance violation, filed two appeals. One appeal was to the Louisiana Supreme Court from the judgment overruling his demurrer challenging the constitutionality of the ordinance. The second appeal was to the criminal district court of Orleans parish from the judgment of conviction and the sentence. Defendant was acquitted in the criminal district court. As to his appeal from the judgment overruling his demurrer, the Louisiana Supreme Court held (96 So. 111, 28 A.L.R. 1385):

> "As defendant has been acquitted, he has lost all interest to prosecute this appeal further. Whatever judgment this court might render on the

demurrer could not affect him, since there is no longer a charge against him. Hence the question brought here has become a moot one, and there remains nothing to do but to dismiss the appeal, as this court will not pass on moot questions, and, moreover, is without right or power to do so."

The often-cited ruling on when a case is moot in the U. S. Supreme Court is reported in *St. Pierre* v. *United States*, 319 U.S. 41, 63 S. Ct. 910, 86 L. Ed. 1199, (1943). In that case the petitioner, who was sentenced for contempt, was granted certiorari on the ground his petition raised a constitutional question involving self-incrimination. The court thereafter held that the case was moot because the petitioner had completed serving his sentence before certiorari was granted. Quoting from 319 U.S. 42, 43, 63 S. Ct. 911, 87 L. Ed. 1201:

"* * * A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. [Citations omitted.] The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to petitioner the penalty of the term of imprisonment which he has served. Nor has petitioner shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied. * * *"

Recent U. S. Supreme Court opinions have adhered to this rule. Cases where no "further penalties

or disabilities can be imposed" include the following: *Travis* v. *United States*, 364 U.S. 631, 637, 81 S. Ct. 358, 362, 5 L. Ed. 2d 340, 345 (1961) where order granting certiorari in two companion cases were vacated as moot because the petitioner's conviction, in the main case, was set aside for improper venue; *Jacobs* v. *New York*, 388 U.S. 431, 87 S. Ct. 2098, 18 L. Ed. 2d 1294, 1295 (1967) where defendants received suspended sentences and the time had expired in which the suspension could be revoked; and *Tanenbaum* v. *New York*, 388 U.S. 439, 87 S. Ct. 2107, 18 L. Ed. 2d 1300, 1301 (1967) where defendant received a suspended sentence and his fine had been paid.

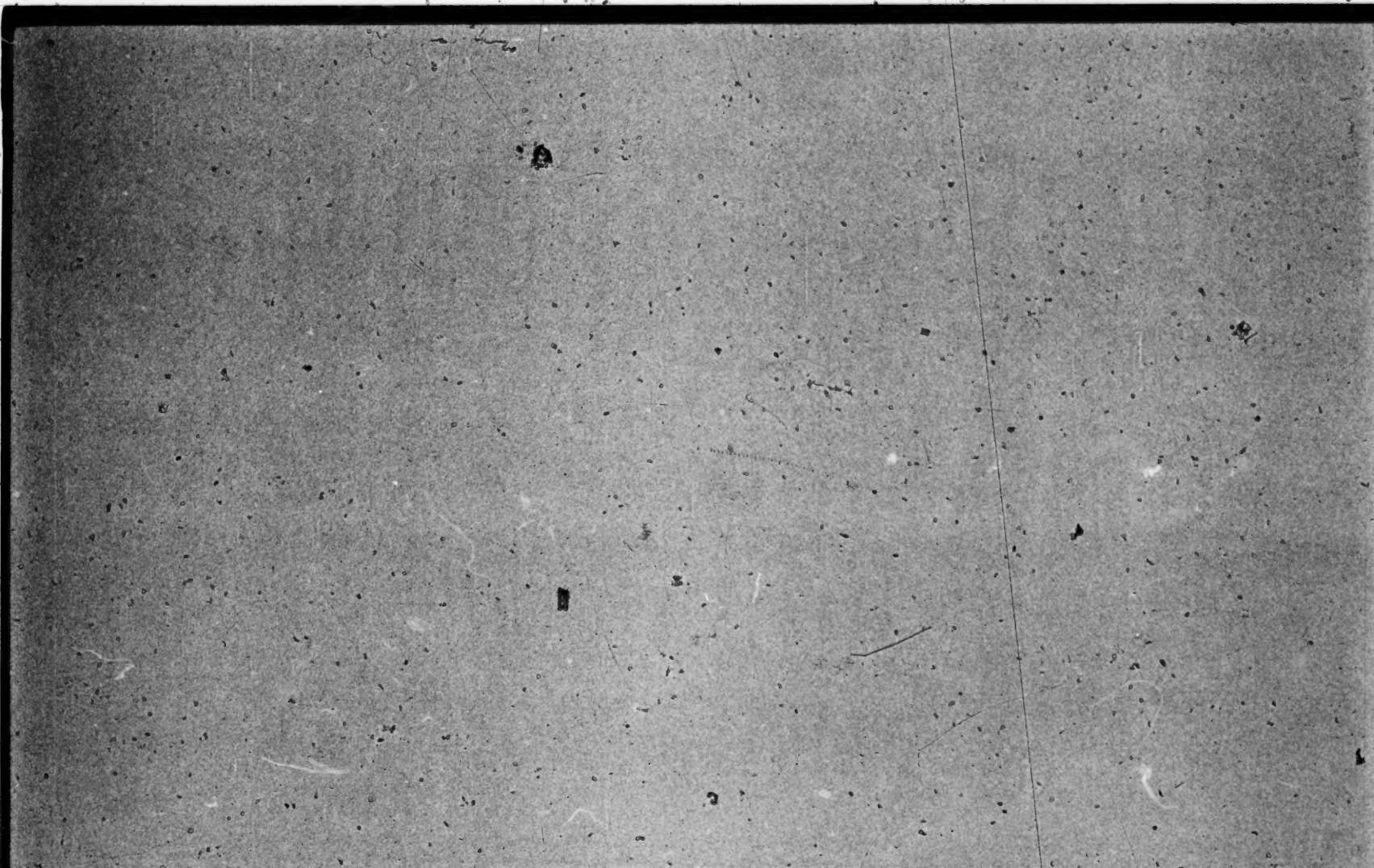
Recent U. S. Supreme Court opinions where "further penalties or disabilities can be imposed" include the following: *Ginsburg* v. *New York*, 390 U.S. 629, 633, 88 S. Ct. 1274, 1277, 20 L. Ed. 2d 195, 200, n. 2 (1968) where, upon conviction, the appellant was given a suspended sentence, but the conviction itself could cause the loss of her business license; *Carafas* v. *LaVallee*, 391 U.S. 234, 237, 238, 88 S. Ct. 1556, 1559, 20 L. Ed. 2d 554, 558 (1968) where petitioner was released from custody before adjudication of the writ of habeas corpus, but as a consequence of his conviction he could not engage in certain businesses, serve as a labor union official, or serve as a juror or vote in New York; and *Sibron* v. *New York*, 392 U.S. 40, 55, 56, 88 S. Ct. 1889, 1899, 20 L. Ed. 2d 917, 930 (1968) where appellant had no opportunity to perfect an appeal before he finished serving his sentence, and

where the record of his conviction might serve to impeach his character in any future trial and would be considered in sentencing upon any subsequent conviction. *Street* v. *New York*, 394 U.S. 576, 579, 580, 89 S. Ct. 1354, 1359, 22 L. Ed. 2d 572, 578, n. 3 (1969) followed the *Ginsberg* and *Sibron* opinions, but mentioned as an additional reason for jurisdiction the fact that, although the appellant had received a suspended sentence that no longer could be replaced by a prison sentence, appellant's employer had instituted disciplinary proceedings against him as a result of his conviction.

In the present case the petitioner has been found not guilty as charged and her bond on appeal has been exonerated (Appendix A hereto). Respondent is aware of no penalty or disability that can flow from that acquittal. The main case terminated July 3, 1969 and no controversy presently exists between the parties. The granting of certiorari herein can in no way affect the outcome of the main case, nor avoid any penalty or disability resulting from petitioner's arrest more than did the judgment of acquittal. Respondent therefore urges that the petition for a writ of certiorari be dismissed as moot.

Respectfully submitted,

MARIAN C. RUSHING
RICHARD A. BRAMAN
306 City Hall
Portland, Oregon 97204
Counsel for Respondent



APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

THE CITY OF PORTLAND, Plaintiff,	)	No. M-48253
v.	)	JUDGMENT
	)	
CAROL DERRINGTON, Defendant.	)	ORDER

This matter came on regularly for hearing on the 1st day of July, 1969, before the Honorable James M. Burns, one of the Judges of the above entitled Court. The plaintiff appeared by William R. Selby, Deputy City Attorney, and the defendant appeared in person and by her attorney George A. Haslett, Jr. Whereupon the said defendant by and through said attorney entered a plea of not guilty to the charge of substantially exposing both breasts, and a jury having been duly empaneled and sworn to try the above entitled cause, and the jury having listened to the testimony for and on behalf of the plaintiff and the defendant, to the argument of counsel and the instructions of the Court, and having retired to deliberate upon its verdict, thereafter returned into Court a verdict finding the defendant not guilty as charged. Whereupon the said verdict was received and the jury discharged. Now therefore it is

ORDERED that the above verdict be and the same hereby is entered of record, and it is further

ORDERED AND ADJUDGED that the said defendant be and hereby is found not guilty as charged. And it is further

ORDERED AND ADJUDGED that defendant's bond on appeal be and the same hereby is exonerated.

DATED at Portland, Oregon, this 3rd day of July, 1969.

(SEAL)

/s/ JAMES M. BURNS
Judge.